Filed 10/5/04 In re Javier H. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re JAVIER H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JAVIER H., Defendant and Appellant.	A103020 (San Mateo County Super. Ct. No. J67050)

The juvenile court found that defendant Javier H. committed murder and attempted robbery. The court committed him to the California Youth Authority (CYA) for 28 years to life. The juvenile court's findings of guilt rest significantly on the incriminating statements defendant gave to police during three custodial interviews. Defendant contends his statements should have been excluded because they were involuntary and were taken in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also contends that even considering his statements, there is insufficient evidence to support the findings of guilt. We disagree and affirm.

I. FACTS

Under applicable standards of appellate review, we must view the facts in the light most favorable to the juvenile court's findings, and presume in support of those findings

the existence of every fact which the juvenile court could reasonably find from the evidence. (See *People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

The Murder

The victim, 55-year-old Raul Mejia, was an immigrant from El Salvador. He lived in a trailer park on East Bayshore near Douglas Court in Redwood City. He ran a gardening business and sent money home to his wife and children in El Salvador. He habitually carried large amounts of cash.

Mejia was shot dead on the street on the evening of July 4, 2001, during a fireworks display. There were no witnesses to the shooting. We briefly recount the circumstances of the killing.

At approximately 8:40 p.m. on July 4, Robin Hoppes was getting ready to watch the fireworks from the trailer park adjacent to Mejia's. He saw four Hispanic males walk into Mejia's trailer park. One was wearing a red baseball cap, one a dark baseball cap. Hoppes heard Spanish being spoken and then saw four males walk out of the trailer park and onto Douglas Court.

Between 8:00 and 8:30 p.m., Sannette Stewart was sitting in her parked van on Douglas Court, also waiting for the fireworks display. A dark car she believed was a Nissan Maxima pulled up next to her. Inside the car were four Hispanic males and a Hispanic female, all of who appeared to be young adults. The female had shiny multicolored clips in her hair. One male, the driver, wore a red baseball cap; another male might have been wearing a baseball cap. A third male, sitting in the backseat, resembled a young man named Jose Carranza, whom Stewart later identified in a photo lineup. The driver asked Stewart if he could park there to watch the fireworks. After a few minutes the car drove off.

Between 8:30 and 8:50 p.m., Barbara Paglia was walking on East Bayshore on her way to see the fireworks. She was with her boyfriend, her daughter Cynthia Mendoza, and her granddaughter. As they neared Douglas Court, they saw a black car with its lights off rapidly pull out of Douglas Court on the wrong side of the road. The black car

ran a stop sign and almost hit Paglia and some of her party. Paglia saw at least four people in the car, including one female. One of the males was wearing a baseball cap. Mendoza saw four young males, two wearing baseball caps.

The black car turned left onto East Bayshore and headed south, almost colliding with a northbound van. The van had to slam on its brakes hard to avoid a collision. Hoppes saw the near accident and thought the car was a Nissan Maxima. He thought he saw four people in the car and thought they might be the four he saw leaving the trailer park a few minutes earlier.

The passengers in the van, Lourdes Reyes and Lorena Pullido, thought the black car was a Nissan or a Saturn. The car's lights were off. Pullido saw four or more people in the car. Reyes and Pullido continued to drive north. They soon saw Mejia, who was bleeding, walking southbound. Paglia and Mendoza also saw Mejia, and described him as staggering and mumbling. They thought he was drunk, but Mendoza soon realized he had been shot and was bleeding. Mejia fell to the ground.

A police officer responded to the scene about 9:20 p.m. and found Mejia in the street. The officer thought Mejia had been shot two or three times. Mejia soon died from what was determined to be a single gunshot wound to the torso. He had no other gunshot wounds, but had suffered lacerations to his face from either falling or being struck by the butt of a gun. Mejia had $9,272 in cash on his person.

Mejia had been shot with a .38 bullet from a handgun introduced as an exhibit at trial. The handgun was over 50 years old and was not in good working condition.

The Investigation

The police interviewed defendant five times in July 2001, when investigators considered him to be only a witness and not a suspect. The first four interviews were recorded on audiotape. The fifth, on July 27, was videotaped. After investigators regarded defendant as a suspect in the killing, they interviewed him four times: on August 1, August 2, August 3, and December 21, 2001. The August 1 interview was videotaped. The August 2 and August 3 interviews were not recorded. The December 21 interview was recorded on audiotape.

Defendant moved to suppress the July 27, August 1, and December 21 interviews.[1] We take the following facts from the transcripts of the interviews and from officer testimony at the hearing on the motion to suppress.

The Initial Investigation: Defendant as Witness

Immediately after the July 4 homicide, investigators could not identify any suspects. Four days later, on July 8, Detective Russell Felker arrested defendant for an unrelated robbery. Defendant, who was 15 years old, was placed in custody at Hillcrest Juvenile Hall.

July 12, 2001 Interview

On July 12, 2001, Detective Mark Pollio went to Hillcrest to interview defendant. Pollio did not consider defendant a suspect, or even a percipient witness. Rather, Pollio thought that defendant might know something about the murder because one of defendant's associates, Eddie "Butterfingers" Cervantes, was a "possible suspect." The police suspected defendant and Butterfingers were associated with the same street gang. Pollio was trying to "develop a lead" on Butterfingers, "on the chance that [defendant] might know something." The police still had not identified any suspects in the murder.

Pollio met with defendant in the interview room at Hillcrest. He told defendant he was not going to talk to him about the robbery charge (which apparently was also a probation violation), but about the Mejia murder. He told defendant, "I believe you're maybe a witness and that's how I want to talk to you, as a witness." He also told defendant, "I can't make any promises or make any deals . . . I don't know . . . if you're involved or not. I don't believe you are but I don't know yet, okay?"

[1] Technically, defendant moved to suppress the July 27 interview "and all subsequent statements," thus including the August 2 and August 3 interviews. But as we will discuss, these two August interviews were brief, unrecorded, and relatively inconsequential. Defendant did not incriminate himself in these interviews with regard to the homicide. Defendant barely discusses them in his opening brief, but focuses on the July 27, August 1, and December 21 interviews. Indeed, in describing the proceedings below respondent states the juvenile court "denied [defendant's] motion to suppress the incriminating statements of July 27, August 1, and December 21, 2001 . . . ."

In what he admitted was the interrogation technique of a "bluff," Pollio told appellant, "I don't believe you're telling what you know." He added, "I believe I understand why and I want to do everything I can to assure you that we will not try to make things difficult for you. Okay? And if you are cooperative and tell me the truth, I will speak to your probation officer and let them know that you cooperated in a very serious investigation. And if necessary I will tell the court that. Okay?"

Because defendant was in custody, and because "I did not know whether he was involved or not," Pollio read him his *Miranda* rights "just out of caution." Defendant indicated he understood his *Miranda* rights. The audiotape of the interview reveals that Pollio explained the *Miranda* rights slowly and carefully. But Pollio never asked defendant if he wished to waive those rights.

Pollio then told defendant, "I want to emphasize that we're just after the truth. Okay? And I believe you may be a witness. I do not believe that you're a suspect. Okay? But I do need the truth."

Defendant said he didn't know anything about the murder, and also that he was scared to talk. In another "bluff," Pollio again accused defendant of "know[ing] more than you're telling." Pollio asked defendant, "Did you rob the man or kill him?" Defendant replied, "No." Pollio responded, "Then if that's true then you don't get charged with that."

Pollio promised defendant he could keep his name a secret until the killers were safely in custody. He told defendant, "The best witnesses are going to be the other guys in the car, the guys that were not involved but were in the car." Defendant denied he was in the car and Pollio told him, "[Y]ou just stepped down a notch."

Pollio then described the victim, noting he was a 55-year-old man with a wife and several children. He stressed the desire of the police to find and punish Mejia's killer or killers. And he noted it was "not easy" for "somebody in your position to come forward with information." He then told defendant he was "kind of like stuck now" because "[H]ow do I know you weren't in the car? How do I know you weren't involved? We

need you to talk to us. I don't think you were. But we need you to talk to us about what you do know. It's very important."

Defendant said little in response. Pollio said, "[Y]ou're not respecting me now." Defendant said he knew nothing about the killing. Pollio asked if he was scared, and then went into a rather lengthy speech. He first said if defendant would "stand up and do the right thing and tell us the truth," Pollio could talk to defendant's probation officer "and, if necessary, the court." He then encouraged defendant to have "the strength of a man to break through the difficulties and . . . do the right thing." He told defendant he was "a decent kid" who had "gotten involved with the wrong people." He urged defendant that if he could "fight through that now" and tell Pollio the truth, "in return it just might help you, by letting the court know that you can do the right thing." He urged defendant to "have the strength of a man to find the strength to tell the truth."

Defendant again denied knowledge of the homicide. He said that on July 4 he was "out with my girl." He described his movements that day. When Pollio caught defendant in a minor inconsistency, Pollio asked defendant, "[W]hy are you treating me like an asshole?" Pollio testified he said this to "push[]" defendant into talking, because "people who have knowledge of crimes, especially gang-related crimes, are not generally forthright and open with what they know out of fear for personal safety or fear for being labeled a snitch . . . ."

In the balance of the interview, defendant admitted he knew Butterfingers as well as Jose "Guero" Carranza, who was so nicknamed because "Guero" is slang for a light-skinned Hispanic.

Pollio testified that defendant freely and voluntarily answered all questions and did not seem reluctant to talk. Defendant did not ask to terminate the interview. He did not appear nervous or agitated. The interview lasted 30 to 40 minutes.

July 14, 2001 Interview

Two days later, on July 14, Detective Felker went to Hillcrest to interview defendant. Detective Pollio and Detective Edward Feeney asked Felker to conduct the interview, because they thought Felker and defendant had a rapport—and "because of the

gang affiliation" they thought defendant might know something about the homicide. Felker knew defendant was a member of the Norteno gang, whose gang color was red, and that a possible suspect in the July 4 homicide had been wearing red. Felker testified that wearing red clothing could indicate an affiliation with the Norteno gang.

Felker did not read defendant his *Miranda* rights because he did not regard him as a suspect. Defendant told Felker that Butterfingers and Guero showed him an "old cowboy" gun "[a]fter the 4th of July" and maybe on the 5th. The gun was wrapped in a red rag. Apparently, another man known as "White Boy" had stolen it and several other guns from someone's house.

Defendant told Felker he "hadn't heard" about the murder. Felker accused him of lying. Defendant told Felker that Guero admitted that he "shot somebody." It is not clear, but Guero seems to have said this on the occasion of showing defendant the gun. Defendant told Felker that Guero habitually wore a red hat. Defendant suggested the hat may have been a baseball or baseball-style cap—he described it as red "like San Francisco or Niners."[2]

Felker told defendant, "I want the shooter." Defendant replied, "I don't know who the shooter is. I would tell you but I don't know." Felker asked defendant to "give me something to go on." Felker asked defendant whom he was protecting. He told defendant, "I know you know something." Defendant said he did not know anything. The interview concluded.

At that time, Felker had no reason to disbelieve defendant. He had no reason to believe defendant was present at the scene of the homicide or knew anything about it.

Felker testified defendant seemed willing to answer, and tried to answer, his questions. He never said he did not want to talk to Felker, did not request an attorney, and did not ask to terminate the interview.

[2] In a subsequent statement, defendant described Guero's red hat as a baseball cap.

July 16, 2001 Interview

Two days after the Felker interview, Detectives Pollio and Feeney went to Hillcrest for a third interview with defendant. This interview was meant to follow up on defendant's revelation to Felker that Guero and Butterfingers showed him a gun and Guero said he had shot someone. Pollio testified he still did not consider defendant a suspect, but "possibly" a witness—although not a percipient witness to the killing.

Again, Pollio testified that he read defendant his *Miranda* rights as a cautionary measure. Defendant indicated he understood his rights.[3]

Defendant told the detectives that "right around," and possibly after, the Fourth of July, he spoke to Guero, Butterfingers, and White Boy. Guero showed him a revolver wrapped in a red rag. Guero said "he shot somebody." Guero and Butterfingers were "scared" and watching for police. Butterfingers admitted he was at the scene of the shooting. Guero and Butterfingers said they shot someone while they were trying to rob him—but they didn't get any money. Guero is a member of the Norteno gang.

Pollio testified that none of the questions to defendant were framed to accuse him of being involved with the homicide. Defendant appeared willing to talk and never tried to terminate the interview. He was not nervous, seemed truthful, and appeared to be wanting to cooperate and provide information.

July 18, 2001 Interview

On July 18, Detective Pollio returned to Hillcrest for a fourth interview with defendant. Pollio was accompanied by Detective James McGee. Pollio was still hoping to get information about the homicide. Since the last interview the police had obtained a letter written to defendant by Samuel Zacharias, but not mailed. The police were unsure if the letter revealed anything about the homicide. They still did not consider defendant a suspect, but possibly a witness to events or conversations that occurred after the homicide.

[3] Pollio read the *Miranda* rights to defendant before the tape recorder was turned on. This was an "oversight."

At the outset of the interview Pollio asked defendant if he remembered the previous time Pollio read him *Miranda* rights. Defendant said he did. Pollio then read him his *Miranda* rights again, as a "precaution." Defendant indicated he understood his rights. But Pollio did not ask defendant if he wished to waive them.

Defendant lived in a room at the Capri Hotel with his mother and little sister.[4] As the July 18 interview began, defendant told the detectives that Guero had driven to the Capri Hotel in a black car on the occasion that Guero showed defendant the gun. Later that evening Guero and Butterfingers returned to the Capri Hotel, and said they had shot someone while trying to rob him.

Pollio told defendant to be truthful "[b]ecause we're getting more and more information every day." But defendant again denied he was in the car at the time of the shooting.

McGee responded, "You need to be very, very careful because let me sort of lay it on the line for you. Those guys are adults, okay? You're a juvenile. This criminal justice system looks differently at adults and juveniles. We don't believe that you were the one who pulled the trigger or anything like that. But you know somebody is gone, right? Has died." He then told defendant, "They were doing this to rob for money. *That makes this a death penalty case*." (Italics added.)

Defendant said he understood that. McGee went on: "Extremely serious. If you are in any way tied up in this, or you know more information, you need to tell us now before this goes downhill very fast. You don't want to be doing a lot of time in jail, not just here because what happens, if you're caught up in this and you're not telling us the truth right now, *you go to prison. When you're 18, you go to prison.* I don't want to scare you *but this is some serious shit. This is like the most serious shit there is.*" (Italics added.)

[4] Throughout the proceedings below, the parties referred to the Capri as both a hotel and a motel. We refer to it as the Capri Hotel for the sake of consistency.

McGee continued: "This isn't like just gangbangers shooting each other where you go to prison for the rest of your life. *This is a death penalty case.* You really need to tell us everything you know. I think you're telling us some of what happened. But I think there's some more that you could tell us. You know what it is? . . . These guys don't give a shit about anybody. They sure as hell won't be out there protecting you. You need to take care of yourself. For your family, for your future family, when you're married and have kids. You need to do what's right for you." (Italics added.)

McGee testified that he wasn't threatening defendant with going to prison or with the death penalty. He did not regard defendant as a suspect or even a percipient witness. He was simply trying to impress defendant with the seriousness of the case, and the serious consequences—such as the death penalty—for the actual shooter. The references to prison and the death penalty did not cause defendant "to change the position that he had maintained" and "to now provide [McGee] with information regarding his involvement in the homicide[.]"

As the July 18 interview continued, McGee urged defendant to "tell us exactly everything you know." After Pollio questioned defendant about "Sammy[boy]," the person who wrote the letter, McGee told defendant the police were making arrests and were "starting to talk to people." The detectives "need to know" if defendant was "just in the goddamn car." McGee said, "Once it breaks off at a certain point, I can't do anything to help you." He told defendant he knew "you're not the one who pulled the trigger," but "these guys are starting to talk . . . [and are] starting to implicate you in the whole thing."

Defendant insisted, "I wasn't in the car."

McGee told defendant, "[Y]ou need to start talking because this pile of stuff is gonna get bigger and bigger and you're gonna get caught in this crap." He told defendant about Sammyboy's letter, and said the letter implied defendant "[was] there and know everything about what happened that night." Defendant replied, "I don't know what he's saying."

Defendant said he thought Guero and Butterfingers were in the car, along with Guero's girlfriend Yessina—who sometimes wore butterfly clips in her hair. He did not

specify the source of his knowledge of who was in the car. Defendant also said the guns White Boy stole were old guns, "like the ones you collect."

After more, relatively inconsequential questioning, McGee told defendant, "[T]ime's running out for you to help us out. So, now's it. If we get proof that you had more information. . . . [A]nd you didn't supply [us] with [it] now, its such a serious case, *you're gonna be also an accessory to the whole thing because you're not helping us out.*" (Italics added.) McGee suggested that withholding information could "hook[] [someone] up for a long time." He also reminded defendant that the victim had six children, "six kids without a dad right now because these guys decided to steal some money. . . . [T]hat's like if someone killed your dad." The interview concluded, with the detectives asking defendant to call them if he could provide more information.

The interview lasted approximately one-half hour. Defendant had been "very calm and relaxed." He was not nervous and freely answered all the detectives' questions. He was cooperative and was never resistant. He never asked for an attorney or asked to terminate the interview.

July 27, 2001 Interview

Detectives Feeney and McGee scheduled a fifth interview with defendant for July 27 at the Redwood City police station. Feeney obtained a court order authorizing the transportation of defendant from Hillcrest Juvenile Hall to the station. The order referred to defendant as a "possible witness."

Defendant's probation officer took him from Hillcrest juvenile hall to another facility, where Feeney and McGee took custody of defendant and took him the rest of the way to the station. During this portion of the trip, the probation officer read defendant his *Miranda* rights and urged him to tell the truth. Defendant said he was afraid of retaliation from members of the Norteno gang. When Feeney and McGee took custody of defendant, he was "very calm" and "cooperative." But McGee thought he looked "a little scared."

Detectives Feeney and McGee interviewed defendant on July 27 in the "soft room" used to interview victims and witnesses. The interview was videotaped. The

videotape shows the soft room was furnished with a large L-shaped couch, two hard chairs, and a small circular occasional table. Apart from the barren walls, it appears to be similar to the sort of reasonably comfortable generic waiting room that one might find in many government buildings.

At the outset of the interview, Feeney did not consider defendant a suspect or a percipient witness to the homicide. Feeney hoped he could get more information from defendant "on the two other subjects," presumably Guero and Butterfingers. Feeney had a "hunch" that defendant was "holding back on some information."

The July 27 interview is significant because it marks the first time defendant admitted to police he was at the scene at the time of the shooting.

As the interview began, Detective Feeney told defendant he was going to read him his *Miranda* rights. Detective McGee asked defendant, "You been read these before?" and laughed. The videotape shows the laugh was brief and did not appear to indicate flippancy about the *Miranda* rights or derision of defendant. And everyone in the room knew that defendant had been read his *Miranda* rights numerous times in the past.

Feeney read the *Miranda* rights. Defendant indicated he understood them. But again, the police did not ask defendant if he wished to waive those rights.

Defendant admitted he hadn't told the complete truth, and in fact had lied, in his previous interviews. But he had decided to now tell the truth. On July 4, Guero came by the Capri Hotel about 11:00 a.m. and told defendant he would come back to pick him up that night. Guero came back in the late afternoon in a car. Guero was driving, and Butterfingers and Yessina were in the car.[5] Guero showed defendant the gun, a revolver, which was wrapped up in the trunk.

Butterfingers suggested that they go rob someone. Butterfingers asked Guero if "he was down," and Guero said, "Yeah." Defendant apparently first said, "I don't know," but then said "I'm down" but he didn't want to get caught. Defendant got in the

[5] Elsewhere in his statement, defendant said Guero, Butterfingers, and White Boy were in the car, and the group later picked up Yessina.

car to "prove [to] my homies that I'm down" because "if you ain't down, they kick you out of . . . the clique." They drove around and returned defendant to the Capri Hotel about 6:00 p.m.

As they dropped him off, Guero and Butterfingers told defendant, "We'll be back." They said they would be back about 9:00 p.m. Defendant asked himself, "[W]hat the fuck I'm doin'." Although Guero and Butterfingers had said earlier in the day they were going to rob someone, this time they told defendant they were just "gonna do something" when they picked him up at 9:00 p.m.

The men returned as promised. Defendant didn't know what they were going to do. Defendant thought they might be going to a party. They drove around until they saw "this old dude walking."[6] To defendant, "old" meant the 40's or 50's.

Guero was driving, and Butterfingers was in the front passenger seat. Defendant was in the back. Yessina was in the back seat with defendant. Guero was wearing a red sweatshirt and red baseball cap. Butterfingers was wearing a red 49ers jersey. Yessina was wearing something "to hold her hair," presumably clips of some sort.

When they saw the victim, Butterfingers said they should rob him. Guero stopped the car near the victim, and he and Butterfingers got out. Defendant stayed in the back seat because he was scared. It was between 9:00 and 10:00 p.m., and the fireworks had begun.

Guero hit the victim with the gun, and the victim fell. Butterfingers went through his pockets. Guero then shot the victim. The two got back in the car. Guero drove off and almost hit another car, and at some point switched his headlights off. Defendant "just got nervous, you know. It's just like, *wow*."

McGee spoke up and told defendant the others had "dragged you into somethin' horrible" and "wrong." Defendant resumed his tale. He said Guero drove around some

---

[6] Defendant and his cohorts repeatedly referred to the homicide victim, Raul Mejia, as the "old dude" or the "old guy." To accurately convey the substance of defendant's various statements about the homicide, we quote defendant using those terms.

more, and then apparently crashed the car into a telephone pole near the Capri Hotel. Defendant ran home between midnight and 1:00 a.m. Defendant said Guero and Butterfingers did not get any money from the victim.

Defendant then said that during the homicide Butterfingers was wearing a pair of defendant's gloves. He then corrected himself and said that it was Guero who wore the gloves. When Guero first came to pick defendant up in the car—this would be in the late afternoon of July 4—Guero asked defendant if he had any gloves he could lend him. The black car was stolen, and Guero said he did not want to leave his fingerprints in it. The gloves were batting gloves used in baseball. Guero wore them when he shot the victim.

After some more questions, one of the detectives asked defendant if he needed to use the bathroom. He did not. A detective brought him a soft drink.

Defendant again said he wanted to be honest with the detectives and change his life style, including leaving the gang. One of the detectives responded, "[T]his whole process, tellin' the truth and comin' clean about everything is a step in the right direction."

Defendant said he had spoken to his brother a few days before and his brother told him, "Damn, you gotta just change." That got defendant to thinking that if the police came to talk to him again, "I'm gonna say, You know what? I want them to help me, so I'm gonna help them." After a few more questions defendant returned to the theme of wanting to help the detectives: "I was just thinking, you know, if I should help 'em. . . . [¶] Help, help you guys like what, what was goin' on, you know. . . . [¶] [I would] probably get help . . . back, you know. . . . [¶] Just like get out of this place."

Detective Feeney responded, "[W]e take everything into consideration." But he elaborated: "[W]e can't absolutely promise . . . what's gonna happen. . . . [¶] But we talk to people, and we, you know, we tell them that, that Javier was, . . . you know, he was afraid at first and that's why we just got a little bit of the story, you know, in a couple of times we interviewed . . . him before. But then it's, he was thinking. He saw his mom a couple times, and then he talked to his mom on the phone and he started crying, and he wanted to make a change in his life. And that's when you decided that, you know, if we

were to come up again, that you were gonna do the right thing. And . . . I totally appreciate that. And we can talk to the P.O., you know, the P.O."

The detectives showed defendant three photo lineups. He identified Yessina; Guero as the driver and the shooter; and Butterfingers as the front passenger and the man who was trying to get the victim's wallet when Guero shot him.

Defendant said he was telling the truth about what happened on July 4, likening himself to a camera on the scene. Detective Feeney had defendant raise his right hand and repeat the oath administered to a witness, and then asked him, "[E]verything that you've stated today has been the whole truth and nothing but the truth, so help you God?" Defendant said, "Yeah."

Defendant again said he wanted to get out of the gang. Feeney said, "[Y]ou're growing up. You're growing up to be a young man, [and your mother] realizes that. And she wants, she knows that this is, you're sort of at the crossroads of your life. And she wants . . . for you to do the right thing and to go in the right direction and not down the wrong path."

Noting that defendant's mother had been upset and crying over defendant's predicament, Feeney said, "[I]t takes a real big man, and it takes a really, really smart person" to realize how their conduct affects their loved ones. Feeney told defendant his mother would forgive him and it was his "obligation to take care of your mom and take care of your sister and sort of be the man of the house."[7] Feeney told defendant to "get away from the crowd, the people that you[v'e] been hanging with."

As the interview concluded, Feeney advised defendant "the important thing is that you need to talk about it and then actually make something happen. And . . . follow through on it." Feeney asked defendant if he wanted some water, or a sandwich or hamburger. Defendant said he was "fine" but told Feeney, "Appreciate it though." The interview ended.

---

[7] In earlier interviews, defendant told police his father and all but one of his brothers were in prison.

Feeney testified that defendant appeared comfortable during the interview, and answered all his questions. He appeared to understand the questions and his answers were responsive. He never said he didn't want to talk to the detectives, and never asked for an attorney. He never manifested any body language suggesting he did not want to talk. The interview lasted from one hour and twenty minutes to one hour and forty minutes. Defendant did not seem fatigued, was given a bathroom break, and was offered refreshments.

Because defendant had for the first time placed himself at the scene of the homicide, and admitted he had said he "was down" for the robbery, Feeney now considered defendant "possibly something more" than a percipient witness.

The Focused Investigation: Defendant as Suspect

Investigators now considered defendant a suspect in the Mejia killing. Detectives interviewed defendant on August 1, August 2, August 3, and December 21, 2001.

August 1, 2001 Interview

Detective Feeney obtained another court order to transport defendant from Hillcrest to the police station for an interview on August 1. Although the order described defendant as a possible witness, Feeney now regarded him as a suspect. Feeney wanted to interview defendant again to ask him if he was "absolutely sure" Guero was the shooter—because Guero had been arrested and denied any involvement in the homicide.

When Feeney and McGee picked up defendant to drive him to the police station, defendant looked "very scared" and was "a little teary eyed in the back of the car." Defendant said that a day or two after the homicide, Sammyboy had threatened him with a gun if he talked to police. Defendant was afraid for his mother and sister and afraid of being labeled a snitch.

The interview also took place in the soft room at the police station, and was videotaped. At the outset of the interview, Feeney asked defendant if he was feeling a little better, and was still thinking of his mother. Feeney told defendant they would "just go through this . . . real fast—get it over with." McGee said, "The number one thing is

that we always, we care about you and we're gonna take care of you" and "your mom, your little sister."

Feeney got defendant to admit he still had not been entirely truthful because he was scared. Defendant said that Sammyboy had pointed a gun at his temple the day after the killing, and told him he would "go after" him if he said anything.

Feeney told defendant he was going to read him his *Miranda* rights "really fast . . . [a]nd then we can go through this really fast and . . . we can get you out of here." Feeney testified he did not know why he told defendant he would read him his rights "really fast." He also testified that remark "was in context with the whole interview, just to get the facts out."

Feeney read defendant his *Miranda* rights. The videotape shows he read the rights carefully and fairly slowly. Defendant said he understood them. Feeney did not ask if defendant wished to waive his rights. McGee asked defendant if he wanted "a drink to clear your throat or anything." The detectives asked defendant for "complete honesty" about the events of July 4.

Defendant said that White Boy had come to the Capri Hotel on July 3 with a number of stolen guns and a box of bullets. Defendant, as noted, lived in a room at the Capri Hotel; White Boy lived in another room at the hotel.

Around 6:00 p.m. on July 4, Guero, Butterfingers, and Sammyboy came by the Capri Hotel in a black car. Defendant said the car did not appear to be stolen because it still had an ignition key.

Defendant told Sammyboy that White Boy had a gun. Sammyboy went to White Boy's room and came back with a gun wrapped in a red rag. Defendant told Sammyboy about White Boy's guns because he knew Sammyboy needed a gun—but he did not know what for. Sammyboy put the gun in the trunk of the car.

Sammyboy—not Guero—asked defendant for some gloves. Sammyboy said, "We were gonna do somethin' tonight." But Sammyboy "never said that we were gonna go rob or nothin'."

Sammyboy, Guero, Butterfingers and defendant drove off in the black car. Sammyboy—not Guero—was driving. They were looking for drugs. They picked up Yessina. They dropped off defendant back at the Capri Hotel because defendant wanted to take a shower.

The group in the car came back to the Capri Hotel and picked up defendant about 9:00 p.m. Defendant said he thought they were all going to go to a party. The group still consisted of Sammyboy, who was driving, Guero, Butterfingers, and defendant.[8] Yessina was not in the car, but they soon picked her up. They parked and walked to a store and bought some beer.

Guero suggested they go drink the beer at the house of a friend of his, who lived near the two trailer parks in the area of Bayshore and Douglas Court. They drove and parked next to a black van. A black woman sitting in or standing by the van spoke to Sammyboy.

The group then walked to the area of the trailer parks to drink their beer—but defendant said they headed toward the house of a friend of Sammyboy's, not Guero's. The friend wasn't home. Sammyboy told Butterfingers that "We should go to the old dude's house that . . . my homeboy was tellin' about." ("[D]ays before," defendant had heard people talking about going to "the old dude's" house. Defendant had heard the "old dude" had a lot of money.)

Apparently Sammyboy, Guero, Butterfingers, Yessina and defendant returned to the parked black car. Butterfingers said, "We should go rob somebody." Butterfingers told Sammyboy they should go rob "the dude that your homeboys said . . . got a lot'a money." The four men left Yessina in the car and walked to the trailer park where Mejia lived, but his light was off—meaning Mejia was not home. Defendant said that by this time the robbery "was all planned already." The four men discussed the robbery in the trailer park.

---

[8] There is some indication the conversation with Sammyboy about gloves and going to "do somethin' tonight" may have occurred at this time, i.e. the 9:00 p.m. pickup, and not earlier. The interview transcript is less than clear.

Finding no victim the four men walked back to the car. Sammyboy got the gun out of the trunk and put it in the glove compartment.

They started to drive around, and then saw the "old dude" walking. Sammyboy stopped the car. Sammyboy asked, "Are you guys down [for robbing the victim]?" Butterfingers and Guero said, "Let's do it." Defendant said either, "Alright, let's go" or "Yeah, I'm down."

Butterfingers, who was riding in the front passenger seat, took the gun out of the glove compartment and handed it to Sammyboy. The gun was a revolver, loaded with only one bullet; it didn't work very well.

Sammyboy, Guero, and Butterfingers got out of the car. Defendant opened his door a little but closed it, staying in the car—defendant was thinking about being seen by witnesses. One of the other three men called defendant a "little bitch," presumably for not joining them.

Sammyboy, who was holding the gun, hit the victim. The victim fell. Butterfingers went through the victim's pockets. The victim was shot and the three men got back in the car. As they drove away they almost hit another car.

As they drove, Sammyboy said that Butterfingers didn't want the victim shot, but Sammyboy said, "[F]uck that" and shot him. Butterfingers called the victim "stupid" for not simply giving up his money at gunpoint. Defendant was "just scared already. I was just like, *wow*!" Guero said, "Fuck it." At some point Sammyboy turned off his headlights. They drove around some more and dropped defendant off at the Capri Hotel around 11:00 p.m. or midnight.

After some more questioning, touching in part on how and where defendant helped to dispose of the gun the next day, Feeney asked defendant, "How are you holding up? We got you . . . lunch a little while ago, but that was a little bit. You getting hungry?" Defendant replied, "No, . . . my P.O. said you were gonna take me to McDonald's." Feeney agreed.

Feeney again asked defendant, "How are you holding up?" Defendant said he was "kinda nervous" because of "just everything that happened, [I] can't believe it."

Defendant then admitted that when the men in the black car picked him up at the Capri Hotel the second time, the car's license plates were missing. Defendant asked why, and someone said, "[W]e're about to do somethin' tonight." Defendant said, "What?" And the response was, "[W]e're gonna do a robbery." Defendant admitted he knew they were going to rob the "old dude." He knew "they already had it all planned to do the robbery on that guy," i.e. the "old man" they had talked about robbing before.

Defendant was allowed to go to the bathroom. He then identified four people from photo lineups: he identified Sammyboy as the driver, the shooter on July 4, and as the man who had put the gun to defendant's temple; Butterfingers as the front passenger on July 4; and Guero and Yessina as back seat passengers on July 4.

Defendant admitted he had previously identified Guero, not Sammyboy, as the shooter because he was afraid Sammyboy would harm him. Defendant said he was now telling the complete truth. After a few more relatively inconsequential questions, the interview ended.

The interview lasted an hour and twenty minutes or an hour and a half. Defendant seemed willing to discuss the case with Feeney. He answered all of Feeney's questions. He never asked for an attorney and never asked to terminate the interview.

August 2, 2001 Interview

Detective Feeney interviewed defendant the next day, August 2, at Hillcrest. This 15-minute interview was not recorded. Feeney's purpose for the interview was to question defendant further about where he had disposed of the gun. Defendant's prior statements about the disposal didn't check out. The investigators had looked where defendant said he had disposed of the gun, but could not find it.

According to Feeney's testimony, Feeney read defendant his *Miranda* rights. Defendant said he was willing to talk to Feeney. Defendant admitted he had previously lied about how he had disposed of the gun, and now said he had given it to his girlfriend who disposed of it. He said nothing more about the homicide. He answered all Feeney's questions and never tried to terminate the interview.

August 3, 2001 Interview

Detective Feeney interviewed defendant again at Hillcrest on August 3. This interview lasted "probably between ten and fifteen minutes, twenty minutes tops." It was also not recorded. Feeney wanted to talk to defendant because the police had found a gun where defendant had said his girlfriend disposed if it, but the gun was not the same caliber as the bullet removed from Mejia, and thus could not have been the murder weapon.

According to Feeney's testimony, Feeney read defendant his *Miranda* rights. Defendant agreed to talk to him. Feeney confronted defendant "with the fact that he had essentially led [Feeney] on a wild goose chase." Defendant admitted he had lied to the detective and said "he didn't know what happened to the gun that was used in the homicide."

After admitting that he had lied about the location of the gun, defendant said that he did not want to speak with Feeney anymore, and wanted to talk to his probation officer. Apparently, defendant did not say he wanted to talk to an attorney. Feeney thought the reason defendant no longer wanted to talk to him was that defendant didn't trust him. Feeney "terminated the interview" and "simply left."

December 21, 2001 Interview

Because defendant had told him on August 3 that he wanted to talk to his probation officer, Feeney made no attempt to contact defendant until December 21. On that date, Feeney interviewed defendant at Camp Glenwood, a juvenile facility where defendant had been committed for the robbery for which he was arrested July 8. Feeney was accompanied by Detective McGee.

Between August 3 and December 21, Feeney had gathered no information indicating that defendant was not involved in the homicide. Feeney had obtained information which corroborated previous statements of defendant. Feeney wanted to interview defendant because he "just wanted to make sure that I got the last version, or whatever [defendant] was going to tell us, about the truth, about what happened that night. And I was going to give it one more shot."

The interview was recorded on audiotape. Feeney began by telling defendant he was "here to discuss what happened on July 4th." Feeney noted defendant had "been somewhat truthful" in previous interviews. But Feeney told defendant some things he had said had not been the truth. He asked defendant, "[Y]ou're ready to tell the truth today about what happened because you feel bad about what happened?" Defendant replied, "Yeah."

Feeney read defendant his *Miranda* rights. Defendant indicated he understood them. Feeney did not ask if defendant wished to waive his *Miranda* rights. Defendant agreed to talk to Feeney, and did not bring up his comment of August 3 that he didn't want to talk to Feeney anymore. Defendant proceeded to answer all of Feeney's questions.

Defendant said he was "sad" because the victim was shot. He did not want that to happen. He and his cohorts just wanted the victim's money. Defendant "[t]hought we were just gonna jack [i.e., rob] him." Defendant went along with the robbery because "it was just something that [I] had to do, so . . . I gotta prove that I'm down" with his gang. His cohorts, who were all Nortenos, wanted to "see if [he was] down . . . to do things." They knew where the victim lived and that he had a lot of money.

We will hereafter refer to defendant's cohorts that evening as "the Nortenos." Defendant told Feeney that when the Nortenos first picked him up in the afternoon they "were just tellin' that we were gonna go jack somebody" and "they were talkin' about this old dude." Defendant said, "I'm down if you got the gun." Everybody "was down" for robbing the victim. The Nortenos dropped defendant off at the Capri Hotel and said they would be back about 7:00 or 8:00 p.m. But defendant claimed he "didn't know that night we were gonna do it."

Defendant admitted that before July 4, he and the Nortenos had gone to the victim's trailer park to look for him. Defendant had acted as the "backup," or "lookout." The victim wasn't home. The group left.

Defendant said that the Nortenos returned to the Capri Hotel at 9:00 p.m. on July 4, in a black Honda. Guero was driving. Sammyboy was in the back seat. Butterfingers

and Yessina were also in the car. The gun, wrapped in a red rag, was in the trunk. The Nortenos told defendant, "We got heat." Defendant said, "We don't need it." One or more of the Nortenos said they "didn't really give a fuck." Defendant provided some gloves for Guero.

Defendant didn't think they were going to rob anyone, but just that Guero liked wearing gloves. Defendant also claimed the Nortenos would often say they were going to do something, and then not do it. He thought "they was just gonna forget" to rob anyone.

Defendant and the Nortenos drove around. Guero was driving, Sammyboy was now in the front passenger seat, and Butterfingers, Yessina and defendant were in the back seat. Defendant knew the car's license plates had been removed. The group drove to Bayshore to see the fireworks, and parked. Guero "remembered" about "the old guy." Defendant "wanted to leave" but, "I just couldn't, you know. Can't let 'em down."

The Nortenos and defendant walked to the victim's home, leaving the gun in the car. The victim was not home. They walked back to the car and started driving. The Nortenos saw the victim walking.

Guero stopped the car near the victim. Guero asked if "everybody was down" to rob him. Defendant said he was down, but changed his mind at the last minute and didn't get out of the car. One of the Nortenos called him a "bitch." Defendant agreed with the detective's statement that defendant was "down for it at that point and time and . . . just chickened out."

Defendant admitted he knew they all were going to rob the victim, but defendant "didn't know that we were gonna use [a] gun." He thought they were going to beat the victim and take his money. He was "okay with that." He stayed inside the car when he saw Guero grab the gun from the glove compartment. Yessina challenged defendant for staying in the car. He told her, "I just don't fuck around like that."

Guero had hit the victim in the head. There was a shot and "the old dude just fell." Sammyboy and Butterfingers went through the victim's pockets. The Nortenos all got back in the car. They drove away with the headlights off. They were almost hit by a car.

Feeney asked defendant why he had said in the August 1 interview that Sammyboy, not Guero, shot the victim, and had now returned to his story that Guero was the shooter. Defendant said that in the August 1 interview he didn't want to blame Guero.

Defendant then said, "I didn't know they . . . were gonna go shoot him with this gun." He admitted he "went through with the whole robbery thing and everything that happened with this old dude" because of his gang: "I didn't wanna leave 'em down, my own color you know. . . . I didn't wanna leave my homies down." Defendant now thought perhaps "a gang is stupid."

Almost at the end of the interview, Feeney asked defendant if he remembered anything about the victim or felt sorry for him. Defendant said, "It's like when you guys like come and talk, to me I, I was just like I don't wanna think about it. But when you guys come, uh, I remember a lot." Feeney said, "Right." Defendant said, "I don't wanna talk about it." Feeney said, "Are you trying to block it out of your mind?" Defendant said, "Yeah." Feeney asked, "Because?" Defendant replied, "What happened." Feeney said he understood "because . . . it's too painful for you to think about, or you just don't wanna think about it[.]" Defendant said, "Shoot, I just feel bad with that dude what happened."

The interview concluded. It had lasted "probably an hour and fifteen minutes." Defendant never asked to speak to an attorney during the interview.

The Juvenile Court Proceedings

The People filed a juvenile wardship petition (Welf. & Inst. Code, § 602) charging defendant with the murder and attempted robbery of Raul Mejia. (Pen. Code, §§ 187, 664/212.5, subd. (c).) The People also charged that defendant was armed with a firearm, or knew that a principal was personally armed with a firearm, during the commission of both offenses. (Pen. Code, § 12022, subd. (d).)

The Motion to Suppress

As noted *ante*, defendant moved to suppress the statements of July 27, August 1, and December 21, 2001. Defendant argued his statements were involuntary, the product

of coercion, deceit, subterfuge and implied promises of leniency. He also argued his statements were taken in violation of *Miranda* because he did not knowingly and intelligently waive his right to remain silent. Defendant argued his speaking to police after being advised of his rights should not be considered a valid implied waiver of rights.

At the hearing on the motion, defendant presented the testimony of Dr. Alfred Fricke, who holds a Ph.D. in clinical psychology. The juvenile court found that Dr. Fricke qualified as an expert in psychological testing for the purposes of "such things as determining levels of intelligence comprehension as well as other personality characteristics."

Defense counsel retained Dr. Fricke to conduct psychological tests on defendant, with particular emphasis on his "level of functioning." Dr. Fricke met with defendant three times in 2002 and once in January 2003, and also interviewed his mother. He conducted the Wechsler adult intelligence test, scale three; the Wechsler memory test, scale three; the wide range achievement test, and the Bender gestalt test. While conducting the tests he observed defendant clinically and drew some conclusions.

Dr. Fricke testified the Wechsler adult intelligence test showed that defendant's verbal I.Q. is 66, which "would put him in the borderline retarded range." Only one out of 100 sixteen-year-olds would score the same or lower.[9] His performance I.Q. is 64, "in the same general range and [in] the same one percentile." The I.Q. scores are apparently composites of scores in four areas: verbal comprehension, perceptual organization, working memory, and processing speed. In all four areas defendant scored in the 60's, and in all but one he ranked in the lowest one percent. In the fourth he ranked in the lowest two percent. Defendant is "functioning at a very low level."

Defendant has a small vocabulary, which causes him to confabulate—meaning that "he guesses at things. And when he doesn't know, he fills in. He makes things up." "[H]e's just willing to start talking and say any old thing hoping that he's hitting the mark."

[9] Defendant turned 16 on December 18, 2001.

Because Spanish is defendant's primary language, Dr. Fricke also tested him for non-verbal intelligence. Defendant is "very slow both verbal and non-verbal." He also has a "low abstraction ability."

Dr. Fricke was concerned about defendant's competency to stand trial, so he administered the McArthur competency assessment tool. Dr. Fricke testified that defendant's low abstraction ability might make it difficult for him to understand legal concepts. But defense counsel represented to the court that he did not doubt defendant's competency to stand trial, and was not raising an issue of competency. In response to the court's questioning, Dr. Fricke said he had watched defense counsel explain things to defendant and saw "that he seems to grasp it when it's said in very simple language."[10]

Dr. Fricke further testified that defendant was an agreeable person who wanted to please others: "He wants to respond to you. There's an internal pressure to answer and to please you and to give you an answer, even if he doesn't know what it is." Defendant would "just plain guess wrongly" on some questions in the psychological tests, just to provide an answer. He would be more likely to be agreeable toward authority figures: "He has a history of wanting to please adults. . . . He wants people to praise him, to like him, to be on his side." It was "possible" he would be less likely to admit he didn't understand something when talking to police as opposed to other adults.

According to Dr. Fricke, a simple yes or no answer would not indicate to "any degree of real assurance" that he understood his *Miranda* rights. More detailed questioning about each right and its meaning would be required. Defendant could feign agreement with something he did not fully comprehend. Dr. Fricke agreed that defendant had a certain amount of "street smarts," but the psychologist could not come to a definitive conclusion whether defendant did or did not understand the *Miranda* rights.

The People presented the testimony, discussed above, of several investigating detectives who interviewed defendant. The People also presented testimony that defendant had been read his *Miranda* rights at least eight times since he was 10 years

[10] No issue of competency to stand trial is raised on appeal.

old.[11] In addition, the juvenile court reviewed the audio and video tapes of the interviews.

The court denied the motion to suppress. Noting that defendant chose not to testify at the motion hearing, the court observed that "all of this interpretation of what [defendant] was thinking and feeling is unsupported by any evidence" as opposed to "argument [from] counsel." Thus, the court was "left with what I see on the tapes, what I hear on the audiotapes. . . . [¶] [T]he one advantage I have over Dr. Fricke is that I can carefully look at the videotapes and listen to the audiotapes . . . . And what I'm left with is my impressions from those tapes, and, of course, the officer's [*sic*] testimony." And "my own good common sense."

"I was impressed as I watched the tapes that the officers did carefully, on each occasion where it was recorded on the tape, slowly explain the rights in the sense that they asked the questions that they're required to ask. And on each occasion, asked [defendant] if he understood that; and on each occasion, they insisted on a yes or yeah audible answers. . . ."

"I was also impressed with the fact that I don't think [defendant] is as dumb as Dr. Fricke would have us believe based upon the test results." The court saw on the tapes "a young man who starts out thinking, as so many in this situation do, that he is going to talk himself out of it. He's perfectly willing to talk in the beginning, because he thinks he's going to absolve himself."

"As it goes along, I think it starts to come to him that he's getting deeper and deeper into this thing. And he expresses his thought process in his own words on some of the later tapes, or one of the later tapes at least. And I don't see anything wrong with that thought process. I don't think it's something that the police made him think, because I don't have any evidence to that effect."

---

[11] Dr. Fricke testified that these repeated *Miranda* admonitions did not make it more likely that defendant understood his rights, especially if he never invoked them.

"I did also see when we talked about test results that he had an innate intelligence, that he had enough sense to be quite forthcoming when he was comfortable with the subject matter, and [he] had also the intelligence, or street smarts, or whatever you want to call it, when questioned by police a good number of times in the past, I guess, to know when he was getting into an area he could be impeached on. He would be very forthcoming about what things were happening, what the girl was wearing, all these kinds of facts that I guess he was confident he wouldn't get tripped on. But when they asked him for a time, he became very vague, very vague on many occasions."

"This was a young man who knew what he was doing, at least in my opinion. That's the evidence that I have . . . . And he knew that when he was getting into an area where he was getting tripped up, he knew enough to become vague. That's not—excuse the expression, but everybody has used it in this case—that's not the dummy that Dr. Fricke's test results apparently indicate to him. And I'm not sure that he would have thought anything different than what I think if he had those tapes to look at."

"I'm going to find, therefore, that [defendant] did make a knowing, intelligent and voluntary waiver of his rights without any compulsion of any reward of leniency that I can see or hear on the tapes. [¶] I also find that his waiver of his right to silence was implicit in his statements, the way he made them, as I saw them on the tapes, and his behavior as he made them as I saw it on the tapes; and, therefore, I think this is a case of implied waiver, even though that question was not specifically asked of him. [¶] I also find [defendant's] statements were voluntary."

Defendant's statements were admitted against him at the hearing on the juvenile wardship petition.

Defendant's Testimony

Defendant testified on his own behalf.[12] He admitted belonging to the Norteno street gang. He also admitted associating with the individuals we referred to above as "the Nortenos": Guero, Butterfingers, Sammyboy, and Yessina. He was with his girlfriend Wendy on July 4, 2001 until it got dark, when he returned to the Capri Hotel. White Boy came by the Capri Hotel about 4:00 a.m. on July 5 and gave defendant a gun. Defendant was awake all night because he had used methamphetamine. He gave Wendy the gun on the afternoon of July 5.

Sometime between the afternoon of July 5 and his arrest on July 8, defendant saw Butterfingers and Guero near the Capri Hotel. They showed defendant a gun. One of them told defendant "they" had shot somebody.

Defendant admitted he had told his interrogators that he had been with Butterfingers and Guero when they shot someone. But he did not know why he told them that, because he now claimed it wasn't true. He testified he was with neither man on July 4. He could not remember why he changed his stories when he spoke with the detectives.

Defendant claimed he said some things to police that they suggested to him. But he provided no details, except to say that an officer told him Mejia had been shot once. He had showed officers the exact spot where Mejia was shot, but claimed he simply guessed. He claimed that information about the involvement of the Nortenos in the shooting came from others, such as his mother—or else defendant simply made it up. Defendant said he just "heard" that the Nortenos were involved.

Defendant testified he told the officers he was involved in the homicide because they didn't believe him when he denied involvement. He didn't know whether he wanted the officers to believe him—and, if he did, why he wanted to be believed. He wanted the police to like him because they seemed to be willing to help defendant and his family if

[12] The Attorney General argues that given the issues raised on appeal, a detailed discussion of the various themes of the defense to the charges is not necessary. We agree.

he cooperated. He thought the police suggested he was only a witness and would not get into any trouble. He testified he "just didn't know what I was doing or thinking."

The juvenile court found beyond a reasonable doubt that defendant had committed the murder and attempted robbery of Mejia, while a principal was personally armed with a firearm, and declared defendant a ward of the juvenile court. The court committed defendant to CYA for a maximum term of 28 years to life.[13]

II. DISCUSSION

Defendant first challenges the admissibility of his incriminating statements—specifically the interviews of July 27, August 1, and December 21, 2001. Defendant claims his statements were both involuntary and taken in violation of *Miranda*. He then contends that even if his statements were properly submitted, the evidence is insufficient to support the juvenile court's findings of guilt. For the reasons set forth below, we disagree with defendant's contentions.

Voluntariness

Defendant contends that his challenged statements were involuntary because they were "the product of police ploys including deceit, aggression, the promise of benefits and the threat of prosecution," coupled with defendant's "youth and limited mental capacities." But we conclude neither police conduct nor defendant's personal characteristics rendered the statements involuntary.

"A confession is involuntary if an individual's will was overborne. [Citations.]" (*In re Shawn D.* (1993) 20 Cal.App.4th 200, 208 (*Shawn D.*).) Voluntariness is determined from the totality of the circumstances, including the personal characteristics of the defendant and the details of the interrogation process. (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226; *People v. Neal* (2003) 31 Cal.4th 63, 79 *(Neal); Shawn D., supra,* at pp. 208-209.) Among other factors, threats or implied promises of leniency

[13] The People correctly point out that despite the maximum term, defendant can be held at CYA only until he reaches the age of 25.

may render a statement involuntary. (*Neal, supra,* at p. 79; *Shawn D., supra,* at pp. 209-212.)

In the juvenile court, the People bore the burden of proving the voluntariness of defendant's statements by a preponderance of the evidence. (*People v. Sapp* (2003) 31 Cal.4th 240, 267 (*Sapp*); *People v. Markham* (1989) 49 Cal.3d 63, 71 (*Markham*).)

On appeal, we apply an independent standard of review to the juvenile court's determination of voluntariness, in light of the entirety of the record. We necessarily examine the totality of the circumstances surrounding the statements—including the details of the encounters with the detectives and the characteristics of defendant. (*Neal, supra,* 31 Cal.4th at p. 80.) We must accept the juvenile court's resolution of disputed or conflicting facts and related inferences, as well as the court's determinations of credibility, so long as they are based on substantial evidence. (*Sapp, supra,* 31 Cal.4th at p. 267; *Shawn D., supra*, 20 Cal.App.4th at pp. 207-208.)

We first look at the details of the interrogations. Defendant's attacks on the so-called "police ploys" fall into three distinct groups. Defendant argues (1) the detectives deceived him with false promises of leniency; (2) that this "psychological coercion" was extended into "aggressive attacks on [defendant's] truthfulness" and repeated accusations that he was lying and would be treated better if he told the truth; and (3) the detectives deceived him with false threats that he could go to prison or be subject to the death penalty.[14]

(1) False Promises of Leniency. Defendant correctly observes that a confession obtained in reliance on promises of benefit or leniency, express or implied, is involuntary. (*People v. Jimenez* (1978) 21 Cal.3d 595, 611-612 (*Jimenez*);[15] *Shawn D., supra,* 20

---

[14] Defendant's assault on police procedures focuses exclusively on police conduct in the earlier July interviews unchallenged by his motion to suppress. In light of the transactional nature of the interrogation of defendant, we assume arguendo these earlier interviews are relevant to our present discussion.

[15] *Jimenez* was overruled in *Markham, supra,* 49 Cal.3d at p. 71, but only to the extent that *Jimenez* required the People to prove voluntariness beyond a reasonable doubt instead of by preponderance of the evidence. (49 Cal.3d at pp. 65, 69-71.) *Jimenez* was

Cal.App.4th at p. 210.) *Shawn D.* discusses several illustrative cases. (20 Cal.App.4th at pp. 210-212.)

Defendant points to Detective Pollio's statements at the July 12 interview that he would talk to defendant's probation officer and to the court if defendant cooperated and gave Pollio truthful information about the killing. Defendant suggests that although Pollio urged defendant to tell the truth, Pollio had a particular truth in mind: defendant argues Pollio insistently conditioned the "reward[]" of his talking to the probation officer and the court on defendant's admission that he was in the car at the time of the homicide. Defendant suggests that this quid pro quo was the reason that, during the July 27 interview, defendant said he decided to help the police because the police wanted to help him.

"[M]ere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary. [Citation.]" (*Jimenez, supra,* 21 Cal.3d at p. 611; *People v. Higareda* (1994) 24 Cal.App.4th 1399, 1409 (*Higareda*).) The police may point out a benefit to the defendant which would "flow[] naturally" from telling the truth—but a confession is involuntary if the police lead the defendant to understand that "he might reasonably expect benefits in the nature of more lenient treatment" for speaking truthfully. (21 Cal.3d at pp. 611-612.)

Early in the interrogation process, when defendant was still considered a witness, Pollio exhorted him to tell the truth. In essence, Pollio exhorted him to say whether he was in the car at the time of the murder and, if so, to help police identify a suspect. Pollio did not couple this exhortation with a threat or a promise of leniency. Pollio made it clear that all he would do was speak to the probation officer and speak to the court. Pollio made no promise, express or implied, that defendant would receive any more lenient

---

also overruled in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17, but only to the extent that *Jimenez* held that the erroneous admission of a confession was reversible per se under California law.

treatment by telling the truth. In the July 27 interview, the detectives made it clear they could not make any promises and all they could do was speak to authorities.

In *Higareda*, the court held a confession was not rendered involuntary simply because police said they would talk to the district attorney if the defendant told the truth. (*Higareda, supra,* 24 Cal.App.4th at p. 1409.) The present case is similar, and is distinguishable from cases on which defendant relies, all of which involve repeated and obvious promises of lenient treatment (or threats) should the defendant make a statement. (See *Shawn D., supra,* 20 Cal.App.4th at pp. 214-216 [officer promised that honesty would be noted in police report; that if defendant talked he would not go to jail but could see his pregnant girlfriend; that if defendant "explained" himself he would be treated more leniently; and that in exchange for confession officer would speak to district attorney and, by clear implication, make sure defendant was tried as a juvenile not as an adult]; *In re J. Clyde K.* (1987) 192 Cal.App.3d 710, 714-715, 722 (*Clyde K.*) [officer directly tied telling the truth with receiving a citation instead of going to jail];[16] *People v. Flores* (1983) 144 Cal.App.3d 459, 470-471 [clear suggestion defendant would not receive the death penalty if he made a statement].)

We note that in the July 12 interview, defendant did *not* accept Pollio's alleged "promise"—he did *not* tell Pollio that he was in the car. And the suggestion that defendant's desire to help in exchange for help, expressed at the July 27 interview, was not only attenuated by a few weeks from July 12 but seems motivated by defendant's desire to change his life and get out of juvenile hall, as much as by any alleged suggested promise of lenient treatment.

(2) Attacks on Defendant's Truthfulness. Defendant contends he was subjected to "psychological coercion" because the detective repeatedly called him a liar and suggested he would be better treated if he told the truth. He claims the police were "[o]bviously frustrated" by his reticence on July 12, and so began these "aggressive

---

[16] *Clyde K.* was disapproved on unrelated grounds in *People v. Badgett*(1995) 10 Cal.4th 330, 348-350.

attacks" on his truthfulness—including calling him a liar, and asking him why he was treating them "like they were assholes" and "disrespecting" them—at the July 14 and July 16 interviews. The tactics supposedly culminated in defendant's describing himself on July 27 as "having no choice" but to talk to the detectives.

Appellate counsel confuses the chronology of events and mischaracterizes defendant's self-description on July 27. It was *July 12,* not at a later interview, that Pollio asked defendant why he was "treating me like an asshole" and was "not respecting" him. As we described above, the "asshole" comment was simply an interrogation tactic to get a scared witness to talk.

In the July 14 interview, Felker once accused defendant of lying. In the July 16 interview, there were no such accusations or comments similar to the remarks about disrespect. On July 18, McGee said this was a death penalty case and told defendant he could go to prison when he was 18 or be otherwise punished if he did not help the police by telling the truth. But McGee testified he was not threatening defendant but simply trying to get him—still considered only a witness—to grasp the seriousness of the case.

We see no pattern of "psychological coercion," such as the type of repeated accusations of lying, coupled with threats of punishment, that rendered a confession involuntary in *People v. McClary* (1977) 20 Cal.3d 218, 223-225, 228-230 (*McClary*), and similar cases relied on by defendant.[17] In several interviews over a period of several weeks, the detectives tried several interrogation techniques to convey to defendant they felt he was not being completely honest and should show them the respect of telling the truth—to help solve a crime for which defendant was not suspected of complicity. The audio and videotapes do not show a pattern of coercion or the overbearing of defendant's will.

It is true that, at the beginning of the July 27 interview, defendant did say he "ain't got no choice" but to talk. But he said that because he felt the police were going to "find

---

[17] *McClary* was overruled in *People v. Cahill* (1993) 5 Cal.4th 478, 509-510, fn. 17, but only to the extent that *McClary* held that the erroneous admission of a confession was reversible per se under California law.

out" what happened anyway—i.e., solve the crime through their investigative efforts. And again we note that at the interviews during which the so-called "police ploys" were used, defendant did *not* incriminate himself regarding the murder.

(3) False Threats of Prison and Death Penalty. As we have discussed, McGee told defendant on July 18 that he could go to prison. He also said that this was a death penalty case, suggesting defendant was subject to the ultimate criminal sanction. Of course, defendant, as a 15-year-old, was subject to neither prison nor the death penalty. But as we have mentioned, McGee testified he did not threaten defendant with the death penalty or with prison—he was simply trying to show him this was a serious case. Indeed, McGee only told defendant this was a death penalty case, and did not suggest or directly state that defendant was subject to the death penalty. And again, defendant was only a witness with possible leads—and the alleged police misconduct did not lead to an incriminating statement at the interview where the misconduct was used.

In sum, defendant points to alleged "police ploys" which occurred *prior to* the interviews he sought to suppress, and which did not lead to any direct incriminating result. He asks us to assume the "ploys" rendered involuntary subsequent statements made as much as five months later. But before each of the three subsequent challenged interviews, defendant was read his *Miranda* rights—and those interviews show nothing which would render involuntary defendant's incriminating statements. We do not see any police behavior at the earlier interviews sufficient to support a determination of involuntariness.

We next look to the defendant's personal characteristics. Defendant relies heavily on Dr. Fricke's assessment of his low mental functioning, suggestibility, and tendency to guess when he doesn't know something. But against this we have Fricke's own testimony that defendant has "street smarts," and the trial court's factual finding that defendant is more intelligent than Dr. Fricke's testing might suggest. The trial court was relying on its review of the audio and video tapes, which we have also examined. Defendant's behavior on the tapes, particularly the videotapes, does indeed suggest a level of intelligence higher than borderline mentally retarded. And we see little, if any

coaching or suggesting of answers by the detectives. As the trial court found, "This was a young man who knew what he was doing . . . ."

Likewise, the detectives appeal to defendant to, in essence, to have "the strength of a man" and to be concerned about his family were not an impermissible attempt to manipulate emotional immaturity sufficient to invalidate defendant's statements as involuntary.

We also note the circumstances of the interviews show the police behaved professionally, did not verbally browbeat defendant, conducted themselves courteously, and showed concern for defendant's comfort. Defendant was always cooperative, wanted to and did answer questions, and was almost never agitated or nervous.[18]

In conclusion, we conclude, as the trial court found, that under the totality of the circumstances defendant's incriminating statements were voluntary.

Alleged Miranda *Violation*

Defendant contends he did not knowingly and voluntarily waive his *Miranda* rights before any of the three challenged interviews. He argues the juvenile court erred by finding an implied waiver of rights from the fact that defendant understood his rights and proceeded to answer the detectives' questions. We disagree.

It is undisputed that detectives read defendant his *Miranda* rights before each of the three challenged interviews, and asked defendant if he understood them. It is undisputed that in each interview defendant said that he did. But defendant points to the undeniable fact that the detectives never asked him whether, having understood his *Miranda* rights, defendant wished to waive those rights and talk to the officers.

Defendant correctly contends that a waiver of *Miranda* rights cannot be presumed, but must affirmatively appear on the record. (*In re Steven C.* (1970) 9 Cal.App.3d 255, 267 (*Steven C.*).) He appears to concede that a *Miranda* waiver need not be explicit, but may be implied from the words and actions of the defendant. (See, e.g., *North Carolina*

[18] True, at the end of the August 3 interview defendant said he didn't want to talk to Feeney. But defendant readily spoke to Feeney and McGee on December 21, without even mentioning his uncharacteristic reluctance to speak four months previously.

v. Butler (1979) 441 U.S. 369, 373-375 (*Butler*); *People v. Whitson* (1998) 17 Cal.4th 229, 246-248, 250 (*Whitson*).) Indeed, cases have repeatedly found an implied *Miranda* waiver where the accused, having been read his rights and indicated he understood them, proceeded to speak with police officers without requesting an attorney—especially when the defendant knew the interview was being recorded. (See, e.g., 17 Cal.4th at pp. 247-248; *People v. Sully* (1991) 53 Cal.3d 1195, 1233; *People v. Davis* (1981) 29 Cal.3d 814, 823-826.)

In the juvenile court, the People bore the burden of proving defendant's waiver by a preponderance of the evidence. (*Whitson, supra,* 17 Cal.4th at p. 248.) On appeal, as with voluntariness, we apply an independent standard of review to the juvenile court's ruling on the *Miranda* issue. But we apply the substantial evidence standard to a pure question of fact, or to a mixed question of fact and law that is "predominantly factual." (*People v. Waidla* (2000) 22 Cal.4th 690, 730; see *Whitson, supra,* 17 Cal.4th at p. 248.)

Where the facts are disputed, we accept the trial court's resolution of the dispute, as well as its determinations of credibility, so long as they are supported by substantial evidence. (*Whitson, supra,* 17 Cal.4th at p. 248.) And while we exercise independent review, we give great weight to the trial court's conclusions when that court has reviewed the same evidence. (*Ibid.*) Ultimately, we determine whether there was a *Miranda* waiver based on the totality of the circumstances. (*Butler, supra,* 441 U.S. at pp. 374-375; see *People v. Lara* (1967) 67 Cal.2d 365, 379 (*Lara*).)

Waiver of *Miranda* rights is a question of fact. (*In re Dennis M.* (1969) 70 Cal.2d 444, 463; *Lara, supra,* 67 Cal.2d at p. 379; *Steven C., supra,* 9 Cal.App.3d at p. 268.) Here, the question is whether defendant impliedly waived his *Miranda* rights by proceeding to speak with the officers after indicating he understood his rights—and never asking for a lawyer.

We conclude the record shows valid implied waivers of *Miranda* rights at all three interviews. Defendant clearly indicated he understood his rights, and had been read those rights numerous times in his past experience with the juvenile justice system. While not of high intelligence, he possessed "street smarts," as his own expert testified. The trial

court found he was more intelligent than the testing suggested. More importantly, the trial court made detailed factual findings that defendant understood what was going on, understood his *Miranda* rights, and decided to talk to the officers because he thought he could talk his way out of his predicament. Notably on August 3, defendant took the initiative to break off the interview when he did not want to talk anymore. The trial court found a valid waiver, and we must give great weight to that conclusion.

There is substantial evidence to support the trial court's factual determination of implied waiver. Factoring that into our independent review, and having reviewed the audio and videotapes of defendant's interviews, we conclude defendant knowingly and voluntarily waived his *Miranda* rights.

Thus, the juvenile court properly denied defendant's motion to suppress his statements.

Sufficiency of the Evidence

Finally, defendant contends the evidence is insufficient to support the findings of guilt. On the contrary, while the evidence is not overwhelming it is sufficient.

The standard of review of the sufficiency of the evidence to support a conviction is well known. (See *People* v. *Mincey* (1992) 2 Cal.4th 408, 432.) The sole function of the appellate court is to consider the evidence in the light most favorable to the judgment, presume in support of the judgment every fact that can be reasonably deduced from the evidence, and "determine . . . whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt." (*Ibid.*; see *People* v. *Jones* (1990) 51 Cal.3d 294, 314.) The evidence must be "reasonable, credible, and of solid value." (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.)

The People contended below that defendant was guilty of attempted robbery and first degree robbery felony murder, on theories of conspiracy or aiding and abetting. We need not discuss conspiracy because there is sufficient evidence of aiding and abetting.

One who aids and abets others in the commission of a robbery or attempted robbery is liable for a homicide committed by a co-participant in furtherance of the common design. (*People v. Pulido* (1997) 15 Cal.4th 713, 716, 721-722; CALJIC No.

8.27 (2004 Suppl.) (7th ed. 2003).) Clearly Mejia's murder was committed in furtherance of the common design to rob him. And there is sufficient evidence that defendant aided and abetted the commission of the attempted robbery as we now explain.

Defendant's statements are replete with indications that he knew the Nortenos were going to rob Mejia when he got in the black car for the last time on the evening of July 4. Defendant had told the Nortenos he was "down" for the robbery "if [they had] the gun." He specifically admitted knowing the group was planning to rob Mejia. He participated with the robbery to "prove" that he was "down" with his gang. Defendant provided a pair of gloves to one of the Nortenos. He told one of the Nortenos where to find a gun, which defendant knew was in the car. On a prior occasion he went with the Nortenos to Mejia's home to rob him, and stood lookout.

At the scene of the homicide, defendant had a chance to avoid aiding and abetting liability by telling the Nortenos he was withdrawing from the common design to commit the robbery, and by doing everything in his power to stop the crime. (CALJIC No. 3.03 (2004 Suppl.) (7th ed. 2003).) He did neither. His gang was apparently more important to him than Mejia's money or life.

The juvenile court could properly conclude that defendant aided and abetted his Nortenos gang in the attempted robbery of Mejia, and thus was also liable for robbery felony murder. Sufficient, credible evidence supports the juvenile court's findings of guilt.

III. DISPOSITION

The findings of guilt, adjudication of wardship and commitment to CYA are affirmed.

_____
Marchiano, P.J.

We concur:

_____
Swager, J.

_____
Margulies, J.